No. 87-1553

In the Supreme Court of the United States

OCTOBER TERM, 1987

DOMINIC CATALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel in violation of the Sixth Amendment.

2. Whether petitioner was prejudiced by an erroneous statutory citation in the indictment.

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OPINIONS BELOW

The opinion of the court of appeals (87-1314 Pet. App. 1a-38a) is reported at 832 F.2d 705. The opinions of the district court are reported at 646 F. Supp. 752 and 625 F. Supp. 1255.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1987. Orders denying petitions for rehearing in this case were entered on December 9 (87-1314 Pet. App. 39a-40a) and December 11, 1987 (87-6597 Pet. App. B). The petition for a writ of certiorari was filed on March 17, 1988, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was a co-defendant with the petitioners in *United States* v. *Persico,* 832 F.2d 705 (2d Cir. 1987), petitions for cert. pending, Nos. 87-1314, 87-1323, 87-1324, and 87-6597. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to conduct and participate in the affairs of a racketeering enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 1), and the substantive crime of conducting and participating in the affairs of a racketeering enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 2). He was sentenced to a total of 14 years' imprisonment.

1. Eight weeks into the trial of this multi-defendant case, petitioner moved for a mistrial or a severance, claiming that a potential conflict of interest had arisen between him and his counsel, Michael Coiro. The alleged conflict related to the July 26, 1985, indictment of New York State Supreme Court Justice William C. Brennan on federal corruption charges. See *United States* v. *Brennan,* 629 F. Supp. 283, 291 (E.D.N.Y.), aff'd, 798 F.2d 581 (2d Cir. 1986). Petitioner claimed that approximately two weeks earlier he and Coiro had learned that their names had surfaced in an Eastern District of New York investigation as persons who may have paid bribes to Justice Brennan. Petitioner asserted that, as a result, he was refusing to discuss the Brennan matter with Coiro and that he and Coiro could no longer communicate. 625 F. Supp. at 1256.

Following a hearing at which petitioner was represented by separate counsel, the district court denied the motion. The court noted (625 F. Supp. at 1258) that there was a "total lack of connection between the facts of this case and the alleged incidents involving Justice Brennan." More-

over, the court stated (*id.* at 1259), petitioner's concern that he or Coiro would be indicted in connection with that case was supported by nothing more than "rumors and speculation." Indeed, the affidavit of petitioner's new counsel revealed that he was informed by the prosecutor in the *Brennan* case " 'that no charges would be brought [against Mr. Cataldo or Mr. Coiro] in the foreseeable future' " (*id.* at 1258). The court accordingly concluded that "[n]othing has been demonstrated to the Court which in any way would serve to inhibit effective advocacy by [Coiro] on [petitioner's] behalf" (*id.* at 1257).

The district court further noted (625 F. Supp. at 1258) that "[t]here is no need for [petitioner] and Mr. Coiro to confer about any of the Brennan situations insofar as the defense to the instant charges is concerned." The court rejected (*ibid.*) petitioner's assertion that Coiro might sacrifice petitioner to please the prosecutors in another district. In that regard, the court noted (*id.* at 1258-1259) that at the time of petitioner's initial arraignment, 11 months earlier, Coiro was already under federal indictment for racketeering and obstruction of justice in a narcotics case in the Eastern District of New York. On the government's application, petitioner and Coiro had appeared before the district court, and petitioner was fully and carefully advised of the risks of proceeding with Coiro as his counsel. Petitioner nevertheless voluntarily and knowingly waived his right to object to any conflict arising from the fact that Coiro was a defendant in another federal case. 625 F. Supp. at 1257-1259. While it did not hold that petitioner's prior waiver extended to the *Brennan* matter, the district court found (*id.* at 1258-1259) that petitioner's willingness to make that waiver in order to keep Coiro as counsel contradicted petitioner's new assertions of a conflict and reduced the risk that an actual con-

flict of interest had developed. The district court stated in conclusion (*id.* at 1259) that petitioner was free to continue the trial with his new lawyer, either with or without the assistance of Coiro, but that the trial would not be delayed on his account.

2. The trial continued with Coiro as sole counsel for petitioner. Several months later, when the government's direct case was nearly complete, Coiro became ill. Coiro's treating physician informed the district court that Coiro would be ready to proceed with the trial after approximately ten days (Tr. 12,695; C.A. App. 600). Accordingly, the district court adjourned the trial for 11 days. The court also appointed another lawyer, Michael Hurwitz, as back-up counsel for petitioner in the event that Coiro ultimately was unable to return (Tr. 12,725; C.A. App. 627). The government gave Hurwitz copies of the relevant tape transcripts and Jencks Act material (see 18 U.S.C. 3500), and the court made the trial transcript available to him so that he could prepare to finish the trial if Coiro were unable to do so (Tr. 12,696, 12,723; C.A. App. 601, 624).

When Coiro returned to court at the end of the adjournment, he announced that he was "not up to [resuming the trial] mentally," and that "[a]s far as [he was] concerned, [petitioner] didn't have the adequate representation he should have" (Tr. 12,750; C.A. App. 652). The district court concluded that Coiro was "just making a record" for his client (Tr. 12,751; C.A. App. 653), and ordered Coiro to be in court, either to represent petitioner or to confer with and assist Hurwitz in representing petitioner (Tr. 12,751; C.A. App. 681). The court also denied, in a written opinion, a motion by Hurwitz for a continuance or a severance (C.A. App. 678-682). The trial concluded with Coiro and Hurwitz jointly representing petitioner.

3. On appeal, petitioner argued, inter alia, that he was denied the effective assistance of counsel as a result of

Coiro's conflict of interest and as a result of Coiro's illness. The court of appeals did not separately discuss that claim, but simply grouped that claim with others that it found to be without merit (87-1314 Pet. App. 29a).

ARGUMENT

Petitioner expressly incorporates (Pet. 63) most of the claims of petitioners Carmine Persico, Alphonse Persico, John DeRoss, and Anthony Scarpati. We have responded to those contentions in our brief in opposition in Nos. 87-1314, 87-1323, 87-1324, and 87-6597, and we rely on our response there in this case as well.[1]

1. Petitioner renews his claim (Pet. 22-53) that he was denied the effective assistance of counsel both because of a conflict of interest between himself and his trial counsel and because his counsel's performance at trial was constitutionally deficient as a result of counsel's illness. Petitioner, however, has completely failed to show either "that his counsel actively represented conflicting interests" or that such a conflict "adversely affected his lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). He has also failed, under the more stringent standards of *Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984), to demonstrate that his counsel's performance fell measurably below "prevailing professional norms" or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In any event, such factbound claims do not warrant review by this Court.

a. The district court concluded (625 F. Supp. at 1258), after a careful analysis of the facts of this case, that peti-

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[1] We have provided a copy of our brief in opposition in Nos. 87-1314, 87-1323, 87-1324, and 87-6597 to counsel for petitioner in this case.

tioner's and Coiro's alleged exposure in the *Brennan* bribery scheme was "at best speculative." The district court found (*ibid.*) that at the time of petitioner's trial no indictment was reasonably foreseeable. Furthermore, the *Brennan* case was entirely unrelated to this case, and the court properly concluded (*ibid.*) that Coiro's potential involvement in the *Brennan* case would not have any impact on petitioner's defense. Unlike *United States* v. *Cancilla,* 725 F.2d 867 (2d Cir. 1984), on which petitioner mistakenly relies (Pet. 48), there were no government witnesses in this trial whom Coiro might have declined to cross-examine out of fear that vigorous questioning would expose Coiro's own wrongdoing. If a potential conflict of interest ever were to arise, it would be in a possible future prosecution related to the *Brennan* case, not here.[2]

Petitioner had already waived a more serious potential conflict arising out of a case in which Coiro had actually been indicted. As the district court noted (625 F. Supp. at 1259), that waiver undermined petitioner's later claim that, based on a wholly speculative prosecution, petitioner harbored concern that Coiro might sacrifice petitioner in the instant case to curry favor with the prosecutors from another district. Under these circumstances, the district court properly took note of the danger that petitioner was trying to capitalize on a "newly discovered" conflict to seek a severance to which he otherwise was not entitled (*id.* at 1256-1257). Furthermore, even if petitioner could establish an actual conflict of interest, he is unable to identify any adverse effect resulting from Coiro's representa-

[2] Since the cases were unrelated, Coiro would have had no opportunity to use his preparation and trial of the *Persico* case to obtain confidential information from petitioner about the *Brennan* case to use against petitioner. Indeed, because petitioner was fully aware of the potential conflict and had retained independent counsel to advise him about it, he was in an ideal position to protect himself from that possibility by refusing to discuss the *Brennan* matter with Coiro.

tion of him. Indeed, petitioner fails even to allege any defaults in advocacy caused by Coiro's alleged conflict.

b. Petitioner also fails, more generally, to substantiate his claim that Coiro provided ineffective assistance due to his illness. To overcome the strong presumption that Coiro's performance was adequate, petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* v. *Washington*, 466 U.S. at 687. Combing nearly 18,000 pages of trial transcript, however, petitioner can do no more than isolate a few places where counsel allegedly got a date wrong or where a traditional cross-examination technique failed to pay dividends (Pet. 31-33). Furthermore, even if petitioner's unsupported allegation that Coiro's performance was deficient could satisfy *Strickland*'s first prong, he fails to satisfy the second by proving that, but for counsel's errors, he might have been acquitted. Petitioner does not even suggest that Coiro's representation in any way "undermines the reliability of the result of the proceeding." *Strickland* v. *Washington*, 466 U.S. at 693.

2. Two of the racketeering acts in Counts 1 and 2 of the superseding indictment (Acts 34(a) and 34(b) of the redacted indictment) charged petitioner with conspiring to distribute and with distributing large quantities of heroin as part of the pattern of racketeering activity through which he participated in the conduct of the affairs of the Colombo Family (C.A. App. 207-208). The original charging language of those racketeering acts, which is set out in the margin,[3] fully apprised him of the nature and

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[3] Racketeering Act # 56[34]:

Dealing In Narcotics

It was a part of the pattern of racketeering activity that, on or about the dates specified below, in the Southern District of New

elements of the offenses charged, including the type and amounts of narcotics involved and the time periods.

At the very end of the charging paragraphs in the two racketeering acts, the indictment erroneously cited Title 21, United States Code, Sections 812, 841, and 846 as the statutes that petitioner's drug dealing had violated. Those provisions of law are codified sections of the 1970 Controlled Substances Act, 21 U.S.C. (1970 ed. & Supp. V) 801 *et seq.*, which was not in effect at the time the charged offenses occurred. The corresponding federal narcotics laws in force at the time, 21 U.S.C. (1964 ed.) 173 and 174,

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York and elsewhere, the defendant, DOMINIC CATALDO, a/k/a "Little Dom," and others to the Grand Jury known and unknown, unlawfully, willfully, and knowingly did engage in the felonious buying and selling of, and otherwise dealing in, narcotics and other dangerous drugs in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846:

a. From in or about August of 1970 up to and including on or about October 27, 1970, the defendant DOMINIC CATALDO, a/k/a "Little Dom," and others to the Grand Jury known and unknown, unlawfully, intentionally, and knowingly did combine, conspire, confederate, and agree together and with each other to distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, heroin, the exact amount thereof being to the Grand Jury unknown, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846.

b. From in or about August of 1970, up to and including on or about October 27, 1970, the defendant DOMINIC CATALDO, a/k/a "Little Dom," and others to the Grand Jury known and unknown, unlawfully, intentionally, and knowingly did on approximately six separate occasions distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, a total of approximately three kilograms of heroin and diluents, in violation of Title 21, United States Code, Sections 812, 841(a)(1), and 841(b)(1)(A).

required the government to prove that the narcotics in issue had been imported and that the defendant knew it. See *Turner* v. *United States*, 396 U.S. 398 (1970) (upholding use of presumption to supply proof of importation and knowledge of importation of heroin). Importation, however, was neither pleaded in the indictment nor proved at trial.

At the close of the government's direct case, petitioner brought the error in citation to the attention of the district court and the government when he moved for a judgment of acquittal with respect to the narcotics racketeering acts for failure to prove importation (Tr. 14,950 *et seq.*). The district court denied the motion, struck the erroneous citations from the indictment, and instructed the jury on the elements of the corresponding drug laws of the State of New York that were in force in 1970. Petitioner now claims (Pet. 53-62) that he was misled into defending against a charge that was not pleaded in the indictment. This contention is without merit.

As this Court has frequently noted, "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Furthermore, the Court has explained, "[i]n order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute." *United States* v. *Hutcheson*, 312 U.S. 219, 229 (1941). See also *Williams* v. *United States*, 168 U.S. 382, 389 (1897) (immaterial which statute was orig-

inally contemplated by prosecutor if charges made are embraced "by some statute in force"). A conviction should be reversed only if the error or omission in the statutory citation misled the defendant to his prejudice. Fed. R. Crim. P. 7(c)(3).

Petitioner contends that the statute under which he was charged was the prior federal statute, 21 U.S.C. (1964 ed.) 173 and 174, and that the erroneous citation to the later-enacted statute misled him to his prejudice. RICO, however, recognizes as predicate crimes two categories of narcotics offenses: those chargeable under state law and punishable by more than a year in prison, 18 U.S.C. (& Supp. IV) 1961(1)(A), and those punishable under any law of the United States, 18 U.S.C. (& Supp. IV) 1961(1)(D). The New York State narcotics law on which the district court instructed the jury is squarely within the first category. It also is fully described by the charging language in the racketeering acts in issue. Thus, the crime with which petitioner was charged satisfies both the requirements of RICO and the rule of *Williams* v. *United States, supra*, that the charges be embraced "by some statute in force." Petitioner's purported reliance on the prior federal statute, which was never cited or referred to and the importation elements of which were never pleaded, simply ignores these settled principles.

Nor can petitioner in any way demonstrate prejudice from the citation error. He implies (Pet. 54-55), without explanation, that his defense to the narcotics charges was predicated on the importation element of the unspoken statute. But nothing in the indictment remotely suggested that the prior Sections 173 and 174 applied, and petitioner could not have been surprised, misled, or prejudiced by the government's failure to prove an element which nowhere was pleaded in the indictment. In fact, at trial petitioner took precisely the opposite position, claiming

that the government could not invoke the prior federal statute because it had not been cited in the indictment (Tr. 14,959-14,960).

Petitioner's reliance (Pet. 58) on *Stirone* v. *United States*, 361 U.S. 212 (1960), and related cases is completely misplaced. In *Stirone*, the indictment charged the defendant with extortion for interfering with the importation of sand, but the proof at trial and the charge to the jury permitted conviction for interfering with the importation of sand or the exportation of steel. If the jury had convicted the defendant for obstructing the exportation of the steel, he would have been convicted of a crime not pleaded and found by a grand jury. That concern has no application here. The government proved at trial the precise charges that are described in Racketeering Act 34 of the redacted indictment. Only the citation, which is mere surplusage, was changed. Far from changing an essential element of the offense charged, the government was entirely faithful to it.[4]

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[4] In *United States* v. *Groff*, 643 F.2d 396 (6th Cir.), cert. denied, 454 U.S. 828 (1981), a RICO indictment alleged the commission of predicate crimes under specific sections of the laws of the State of Michigan, but the proof demonstrated violations of Ohio state law. Relying on *Williams* v. *United States*, 168 U.S. at 389, and Fed. R. Crim. P. 7(c)(3), the Sixth Circuit found that the charging language made out the elements of the uncharged Ohio statutes and fully informed the defendant of the offenses charged. Accordingly, it affirmed Groff's conviction. The same principles apply here.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60419